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Supreme Court
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MICHAEL RODAK, J

No. 73-1298

In the

Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT CHERRY, MARTIN TUCHOW, SEYMOUR SIMON, EDMUND KELLY and JOHN MERLO,
Petitioners,

vs.

RONALD C. SMITH and JOHN CHESTER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Certain of the defendant Senatorial Committeemen, officials elected under Illinois law, conspired to run a sham candidate in the March 21, 1972 Democratic Primary for the office of State Senator from the 12th Illinois Senatorial District, to have the sham candidate withdraw if he won and then have a substitute candidate in the General Election designated by the Committeemen acting

under color of State law and without his presentation to the voters. Did this scheme violate the rights of the voters and the other candidate in the Primary Election under the First and Fourteenth Amendments to the U.S. Constitution and Section 1983 of the Civil Rights Act, 42 U.S.C. §1983?

STATEMENT OF THE CASE

The facts are adequately set forth in the opinion of the Court of Appeals, reprinted at pages 1a-9a, Appendix to the Petition. A petition for rehearing was denied by the Court of Appeals on January 4, 1974.

REASONS FOR NOT GRANTING THE WRIT

1. The decision of the Court of Appeals is a narrow holding, confined to the unusual circumstances of this case, that the Amended Complaint states a claim upon which relief can be granted.

2. The decision below is grounded on well established lines of decision in this Court and is correct as a matter of law. This case does not establish any new basis for federal intervention into local election matters.

3. There is no conflict between the decision below and any decision of this Court or other Courts of Appeal relied upon in the Petition.

ARGUMENT

he Court of Appeals held that the defendants' scheme ged in the Amended Complaint violated the United es Constitution in two ways. First, the deception in Primary Election abridged and debased the right ote of all voters. Second, the deception resulted in rimination against certain groups of voters (and the r Primary candidate, plaintiff Smith) in violation the Equal Protection clause. The Court of Appeals sion was firmly based on decisions of this Court lying the Fourteenth Amendment as a shield to pro- the integrity of elections against a variety of schemes ch abridge or discriminatorily deny the basic right uffrage. The decision below is a narrow one. Plaintiffs t prove the particular conspiracy alleged in the ended Complaint. Plaintiffs have not challenged the dity of the Illinois statute under which elected Com- teemen are empowered to fill vacancies in a general tion ballot where a candidate nominated in the Primary ction dies or withdraws.

The Court of Appeals properly held that abstention inappropriate since the applicable Illinois statute clear on its face, has been construed by the Illinois preme Court, the plaintiffs seek only relief with respect the particular election involved and since the case l become moot upon expiration of the incumbent Sena- 's term and delay could effectively deny relief. One the decisions relied upon by the Court of Appeals in cussing the issue of abstention was *Pontikes* v. *Kusper*,

345 F.Supp. 1104, 1107 (N.D. Ill. 1972, 3-judge court) recently affirmed by this Court, 38 L.Ed. 2d 260 (1973)*.

United States v. *Anderson*, 481 F.2d 685 (C.A. 4, 1973), cert. granted 42 U.S.L.W. 3347, is a criminal prosecution under 18 U.S.C. 241 which raises a number of issues not present here, including whether an indictment under that statute must allege action under color of state law and whether federal jurisdiction over an election fraud conspiracy with respect to a county office ended with certification of the federal election results. We are unable to join petitioners in reading this Court's decision to review *Anderson* as calling into question the many and long established lines of decision in this Court under which Section 1983 of the Civil Rights Act has protected citizens against abridgement of their federal constitutional rights in state and local elections.

There is nothing in this case comparable to the question in *O'Shea* v. *Littleton*, 38 L.Ed. 2d 674 (1974) whether plaintiffs alleged a real and immediate threat of injury to themselves. Here the Amended Complaint alleges specific injury to the federal constitutional rights of the voters and a candidate who participated in the Primary Election of March 21, 1972. The relief sought, a new election, is a familiar remedy in such cases and bears no resemblance to the risk of continuing federal judicial interference with the operations of a state criminal court which this Court in *O'Shea* viewed as intrusive and unworkable.

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* We are unable to locate the case cited at page 6 of the Petition, *sub. nom. Pontikes* v. *Kusper* which is said to be a decision by this Court *applying* the doctrine of abstention and *overruling* the decision of the three judge court.

ase does not raise the broad issues or justify
e spectre invoked by petitioners of federal judi-
rvention into "any local election issue no matter
othetical or conjectural".

CONCLUSION

ge that an order be entered promptly denying
tion for Certiorari so that the case may pro-
editiously in the District Court to a determina-
the merits.

Respectfully submitted,

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